

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1136

77-1173

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

against

BRUCE KAY,

Appellee,

Appellant.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANT
BRUCE KAY

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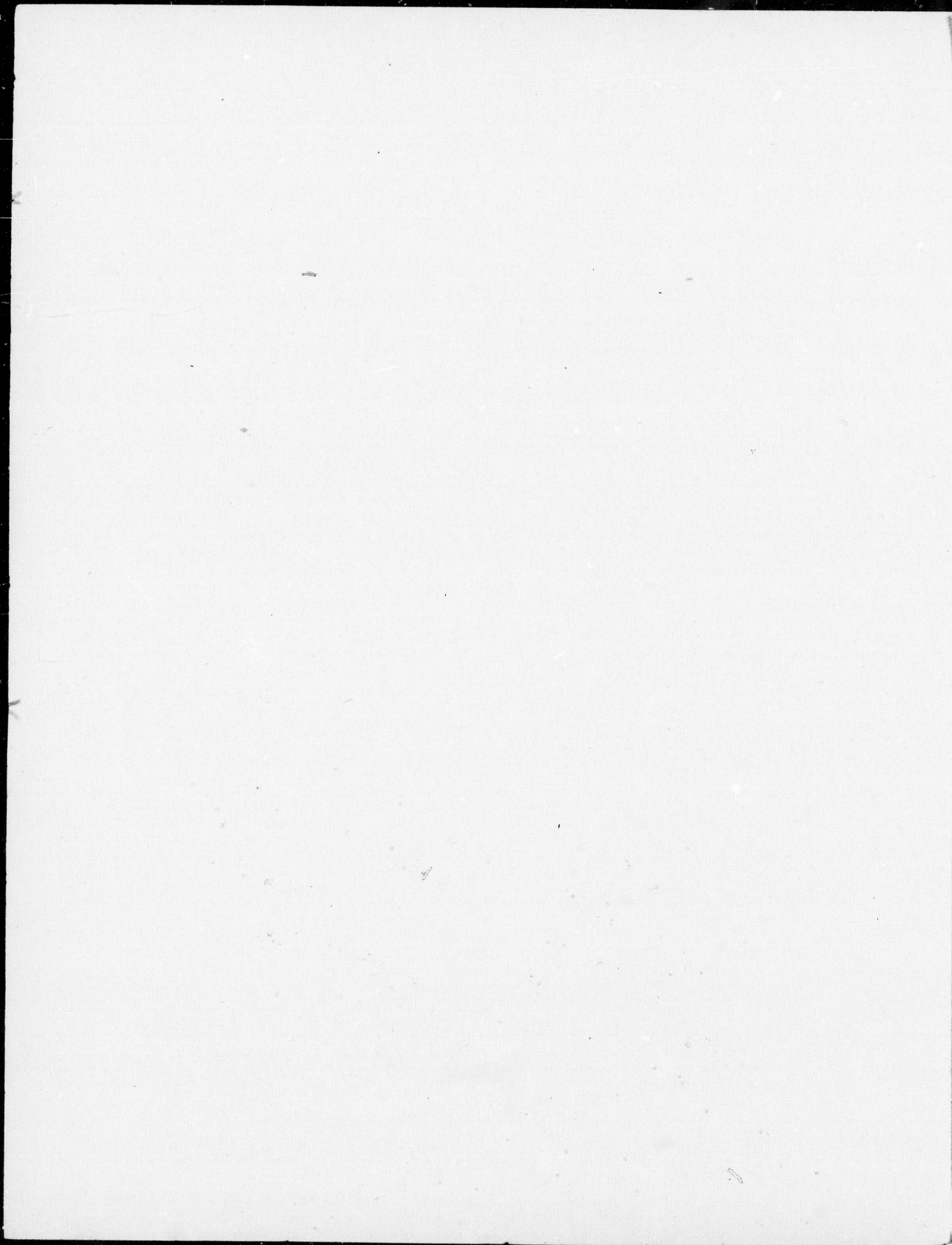


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BRIEF FOR APPELLANT BRUCE KAY

STATEMENT OF THE CASE

Appellant, BRUCE KAY ("Kay"), appeals from a judgment of conviction entered in the United States District Court for the Northern District of New York for conspiracy to distribute marijuana in violation of 21 USC §846 following a three-week jury trial before Chief Judge James T. Foley. Appellant received a sentence of six months imprisonment with a special parole term of two years.

Appellant had been named in the indictment along with 16 other defendants. Only four defendants proceeded to trial: Appellants Kay, KEVIN COONEY ("Cooney"), HAROLD J. LEVY, JR. ("Levy"), and JOHN LEFEBVRE ("Lefebvre"). Cooney and Levy each received sentences of eighteen months imprisonment, and Lefebvre received a sentence of six months imprisonment.

The indictment alleged that the four defendants had engaged in a conspiracy between July 1972 and June 1975 for the purpose of distributing marijuana "at or near Albany." The 5 overt acts alleged that, during this period of time, there were large deliveries of marijuana to Latham and Crescent, New York, suburban towns near Albany, New York.

To prove the conspiracy and each defendant's participation therein, the Government called five witnesses: ROBERT ROTH ("Roth"), MARC COHEN ("Cohen"), WILLIAM KATZ ("Katz"), PAUL MOSKOWITZ ("Moskowitz"), and PAUL CAMMUSA ("Cammusa"). Each witness was an accomplice who confessed to participating in efforts to distribute marijuana in the Albany area, and with the exception of Moskowitz

and Cammusa who had been granted immunity, each had been co-defendant in the indictment. Upon agreeing to cooperate with the Government, Roth's case was dismissed under a pre-trial diversion program. Cohen was permitted to plead guilty to simple possession of marijuana, and the conviction was deferred under the provisions of 21 USC §844(b)(1). Katz pleaded guilty to the conspiracy count, was adjudged a youthful offender, and received a suspended sentence before trial.

A) The Government's Proof of the Conspiracy, and Appellant's Participation Therein.

Based upon the testimony of Roth and Moskowitz, it appeared that in June 1972 Cooney and Levy had entered into an agreement whereby large shipments of marijuana would be transported by automobile from Cooney in Tuscon, Arizona to Levy in Albany, New York. Cooney had explained to Roth in June 1972 that he was moving from Albany to Tuscon, and that he planned to have marijuana driven by car from Tuscon to Levy who resided in the Albany area (164-65).*

* Numbers in parentheses refer to pages of the transcript; numbers bearing the suffix "a" refer to pages of appellant's appendix.

Once Cooney moved to Tuscon, marijuana shipments began to be driven by various individuals to Levy in Albany sometime in October 1972. Roth, Cohen and Moskowitz admitted that for fees ranging from \$700 to \$1,200, each had driven shipments of marijuana by automobile from Cooney's house in Tuscon to Levy's house in Albany. On the return trips to Tuscon, each were given cash and the empty suitcases destined for Cooney toward the next purchase of marijuana. The marijuana was in the form of bricks and stored in suitcases placed in the trunks of the automobiles which had been equipped with heavy-duty shock absorbers to absorb the excessive weight. Upon arrival at Levy's house, the marijuana would be weighed on scales, and distributed for resale in the Albany area (165-67, 171-74, 430-36, 619-26, 1333-38).

The Government's case against appellant rested solely upon the accomplice testimony of Roth, Katz, Moskowitz and Cammus. Appellant's alleged role was that of a driver. There was evidence that appellant had arrived at Levy's house in an automobile with marijuana

on approximately six occasions between September 1973 to May 1974. The marijuana was unloaded into Levy's house (198-201, 1309, 1319). There was evidence that in April 1974 appellant had arrived at the home of William Katz in a camper with marijuana because plumbing repair work was underway at Levy's house, and Levy feared detection. At Katz' house, the marijuana was weighed and restored in the camper (648-50).

Evidence of two conversations were offered by the Government directly against appellant. Katz testified that in April 1974 appellant had told Katz that he would prefer to obtain the marijuana direct from Cooney and sell it to Katz (655). The second conversation allegedly occurred between Cammusa, Levy and appellant at the Friar Tuck Inn in June 1975. Levy stated that appellant would be taking over the business, and appellant advised Cammusa how he could be contacted for future purchases of marijuana (1059, 1063).

There was no evidence that appellant had, in fact, taken over Levy's role in the conspiracy, and both witnesses' testimony was vigorously challenged by appellant on cross-examination.

For example, Cammusa's testimony concerning the Friar Tuck Inn meeting was challenged upon the ground that he had never before claimed that such a conversation had taken place when he testified before the Grand Jury, or when he gave a signed statement to the D.E.A. agents. Cammusa also claimed that he had known appellant for at least one year prior to the meeting. This testimony was impeached by his Grand Jury testimony wherein he admitted that he had not known appellant until July 1975 when he was introduced to appellant on a golf course by William Katz (1241-42, 1245-51). William Katz likewise testified that the first time Cammusa met appellant was on a golf course in the spring or summer of 1975 (968). This impeaching evidence was relied upon heavily by appellant in his summation to the jury (2086-90).

Evidence of the foregoing conspiracy rested solely upon the testimony of these accomplice witnesses because there was no concurrent official investigation at the time of these activities. The evidence of the conspiracy was not uncovered until June 1975 when Moskowitz approached State and Federal narcotic agents for assistance with respect to three State narcotic cases pending against him.

Moskowitz faced a maximum of 15 years in jail if convicted on a charge of possession of cocaine. Moskowitz told the agents that in exchange for his cooperation, he wanted five years probation as a sentence on the cocaine charges. In exchange for his cooperation, Moskowitz did receive recommendations of probation from the Drug Enforcement Agency and State Police,* and immunity with respect to his revelations concerning the conspiracy (1530-31, 1549-52). The grand jury investigation was undertaken in the Northern District of New York based upon Moskowitz's revelation.

B) The Evidence of the \$25,000 Cash Seizure in New Mexico in September 1974.

Following the testimony of the accomplice witnesses at the trial, the Government offered evidence concerning the seizure of \$25,000 cash from an automobile driven by one ANDREW J. BLOSSY ("Blossy") on September 27, 1974 in Las Cruces, New Mexico. Blossy was neither a witness, defendant, nor a co-conspirator in this case.** To prove

* The State Judge, however, sentenced Moskowitz to five years in jail. Moskowitz was serving the jail sentence when he testified at trial.

** Blossy could not be located by the Government for trial. In opening, the prosecutor told the jury that the Government would call Blossy as a witness, "we hope" (138).

the evidence of this seizure, the Government called MICHAEL HAUSER ("Hauser"), two officers of the New Mexico Police Department and D.E.A. Agent, JAMES MONTAGNE ("Montagne").

Hauser was a co-defendant who plead guilty to simple possession of marijuana, a misdemeanor. Hauser, an admitted seller of marijuana in Ithaca, New York, testified that he had hired Blossy to drive an automobile from Ithaca to Cooney in Tuscon, Arizona. This had nothing to do with any activities involving Levy or the Albany operation. Hauser provided Blossy with an automobile, two empty suitcases and \$25,000 cash which was placed in a box in the trunk of the car. In addition, Hauser instructed Blossy to call "Kevin" upon his arrival in Tuscon and gave him Kevin's phone number on a slip of paper (1702-05, 1711-12, 1717-22).

While driving through Las Cruces, New Mexico, en route to Tuscon, Blossy was stopped by a New Mexico police officer for speeding. Upon an alleged consent search, the officer found the \$25,000 cash, marijuana residue in the two empty suitcases, and a set of heavy-duty shock absorbers. In addition, the officer obtained "Kevin's" phone number

from Blossy and notified the narcotic agents (1652-55). D.E.A. Agent Montagne made three telephone calls to the number listed to Kevin. On the first two calls, a woman named "Chris"* answered and stated that Kevin had been waiting for Blossy but was not at home. Montagne testified that both of these conversations were tape recorded, but the tapes were inadvertently erased (1774-89).

Montagne, posing as Blossy, made a third call to Cooney. The agent first attempted to induce Cooney to come to New Mexico upon the grounds that the car had broken down. But, Cooney refused, suggesting that the car be fixed with the money on hand. Montagne then asked Cooney if he could "drive the car back with a load and would you give me \$1,000?" Cooney allegedly replied, "Yes, of course." The investigation, however, ended there. Montagne admitted that he did not follow through with his investigation based upon this information. Instead, he simply filed a report of the incident with his agency. Upon the investigation in the Northern District of New York, this information

* "Chris" was apparently Christine Cooney, the wife of Kevin Cooney. She had been a named defendant whose case was later dismissed under a pre-trial diversionary program.

eventually came to the attention of the D.E.A. agent in charge of the investigation, which lead them to the Blossy evidence (1774-89).

C) The Jury Deliberations and the Interrogation of Juror No. 10, Mrs. Judith Earl, Prior to Accepting the Guilty Verdict.

The record shows that except for a dinner break, the jury deliberated from 11:05 a.m. until 11:35 p.m., a period of approximately 11 hours on December 22, 1976. During the course of the deliberations, the jury made three specific requests for the reading of testimony concerning appellant. At 3:35 p.m., the jury requested a reading of the testimony concerning the appellant's unloading of a camper at William Katz's home (100a). A second request was made about 6:00 p.m. for Moskowitz's testimony regarding appellant's unloading of a camper at Levy's house (104a). The third request occurred at about 10:50 p.m. when the jury requested a reading of appellant's counsel's cross-examination of Cammusa concerning appellant. Upon reading this testimony, it was approximately 11:15 p.m.

The following day was Christmas Eve. Many of the jurors lived great distances from the courthouse (108a-110a).

The judge advised the foreman that, "It is getting late." It is a quarter after eleven" and inquired whether or not the jury wished to retire for the evening and resume deliberations the following morning. The foreman responded, "We would like a little time for deliberations...." and the jury returned to the jury room (110a).

No more than 10 minutes had elapsed when the jury sent a note that it had reached a verdict. The foreman announced, in response to the Clerk's inquiry, that "All of us here, we all find Defendants Mr. Cooney, guilty; Mr. Lefebvre, guilty; Mr. Levy, guilty; Mr. Kay, guilty" (111a).

Counsel for each defendant requested that the jury be polled. Under the polling procedure, each juror was to announce his or her verdict when the juror's name was called. Each juror was first polled as to the defendants Cooney, Lefebvre and Levy. Without any equivocation whatever, each juror, including Judith Earl, announced his or her verdict of "Guilty" (111a-117a).

Then, the polling process began as to appellant. When the Clerk called the name of Juror No. 10, Mrs. Judith Earl, she did not answer "Guilty." Instead, she answered as follows (117a):

THE CLERK: Juror Number 10, Judith Earl.

JUROR NO. 10 (EARL): I would like to say not sure, but I say guilty because of the other -- realizing that all --

THE COURT: (Interrupting) Speak right out.

JUROR NO. 10 (EARL): I would like to say, not sure, but realizing that I am not going to persuade eleven jurors to change their vote.

THE COURT: What is your verdict, your judgment?

JUROR NO. 10 (EARL): Guilty.

THE COURT: All right.

The Clerk then proceeded to poll jurors no. 11 and 12. Recognizing the equivocation of Mrs. Earl's responses, the judge began an interrogation concerning her verdict. She was asked whether she had surrendered any conviction because of pressures. Mrs. Earl responded (118a):

JUROR NO. 10 (EARL): I definitely feel pressures.

THE COURT: What did you say?

JUROR NO. 10 (EARL): I definitely feel pressures.

THE COURT: I can't hear you.

JUROR NO. 10 (EARL): I definitely feel pressure on this decision.

When the judge inquired as to the nature of pressures, Mrs. Earl pointed out that she had been unsuccessful in persuading the other jurors to review the Court's charge relating to conspiracy, and the requirements to become a member of the conspiracy. The judge stated: "Wasn't that made clear to you?" There was no response.

Mrs. Earl went on to state her doubts about appellant's guilt (119a):

JUROR N . 10 (EARL): The other point that I had some doubt on, and I am only saying this because of my reasonable doubt, and I feel that it is reasonable, was the points that we made about Bruce Kay taking over the conspiracy, and I felt that I have reasonable doubt about that.*

At this point, the judge acknowledged that, "...we are in an awkward position...." The judge proceeded to

* According to counsel's recollection, the transcript does not reveal that Mrs. Earl also mentioned that she could not accept the testimony concerning the Friar Tuck Inn meeting. Neither the Government nor the Court challenged counsel's recollection in the proceedings below (139a).

ask, "...do you find Kay guilty under the law as I charged you, and on the testimony given in this case." Again, there was no response.

The judge then asked the juror, "How old are you?" Mrs. Earl responded, "Twenty-five."

When the judge asked whether "any coercion" was placed upon her, Mrs. Earl again expressed doubts about appellant's guilt (119a-20a):

JUROR NO. 10 (EARL): No. I don't --
I mean the only one I felt unsure of,
having any doubt on, was that last Defendant,
was Bruce Kay, and I have --

The judge interrupted:

THE COURT: You may have felt, but
did you finally reach a conclusion that
you want reported and made part of the
verdict in this case?

JUROR NO. 10 (EARL): Yes, I said that
I do.

The Court again asked Mrs. Earl, "Are you under any pressure?" There was a lengthy pause.* Mrs. Earl made the following statement (120a):

* The "lengthy pause" is not reflected in the transcript. It is reflected in counsel's account submitted in the post-verdict motion below (141a).

JUROR NO. 10 (EARL): I concede that
Bruce Kay is guilty.*

Whereupon the judge announced:

THE COURT: Now, I am going to take
her verdict and her judgment.

That happens in many instances when
reasonable doubt arises in the minds of
the jurors, that your judgment has to be
made.

Appellant's counsel sought to object but the Court
immediately propounded another question to Mrs. Earl (120a-21a):

THE COURT: Do you find he is guilty?
I am going to ask you directly.

JUROR NO. 10 (EARL): Yes, I find that
he is guilty.

* * * *

THE COURT: Now is the time to express
it. You have two things, guilty or not
guilty.

JUROR NO. 10 (EARL): Guilty.

* The Court Reporter was unclear whether Mrs. Earl
said "concede" or "can see." Before the jury was
discharged, the reporter asked the juror for a clar-
ification. The juror spelled the word c-o-n-c-e-d-e.
This observation is likewise in counsel's affidavit
and remained unchallenged by the Government or the
Court below (141a).

THE COURT: All Right.

MR. RYAN: May I inquire?

THE COURT: No, I am going to accept the verdict.

The Court refused appellant's counsel's request to make an inquiry of Mrs. Earl, and after the jury was discharged, prohibited counsel from interviewing Mrs. Earl before she left the courthouse. Motions were immediately made to set aside the verdict, but were denied by the Court (121a, 125a-30a).

A formal post-verdict motion was thereafter filed on behalf of appellant to set aside the verdict (132a). The Court denied the motion with a 13-page memorandum-decision in which it found that Mrs. Earl "was only stating, in her own way, the difficulties she had to overcome and that were on her mind in order to resolve the doubts and agree with the other jurors concerning defendant Kay." Not finding any coercion or reasonable doubt in the juror's mind, the Court let the verdict stand (172a).

POINT I

APPELLANT DID NOT RECEIVE A FAIR TRIAL AND WAS PREJUDICED BY THE RECEIPT OF EVIDENCE CONCERNING THE SEIZURE OF \$25,000 CASH IN NEW MEXICO AND THE ALLEGED TELEPHONE CONVERSATION BETWEEN KEVIN COONEY AND LAW ENFORCEMENT OFFICERS.

Appellant contends on this appeal that he was severely prejudiced by the admission of substantial evidence concerning the seizure of \$25,000 cash from Andrew J. Blossy in Las Cruces, New Mexico on September 27, 1974. The basis for our contention is the fact that the entire Blossy incident was unrelated to the conspiracy on trial, constituted hearsay evidence, and necessarily had an impressionable, but unwarranted, impact upon the jury in support of the Government's case against appellant. Outside of the evidence of the Blossy incident, the Government's case rested solely upon the testimony of four accomplice witnesses whose credibility had been vigorously attacked on cross-examination and had to be weighed with caution and care.

The Government's obvious purpose in offering evidence of the Blossy incident was to lend credence to the

accomplices' testimony through testimony of law enforcement officers, and the physical evidence seized.* The \$25,000 cash, two suitcases containing marijuana residue and the heavy-duty shock absorbers, all provided vivid evidence of a similar character from which the jury could infer the accomplices must be telling the truth concerning the method of shipping marijuana from Tuscon to Albany.

The record reveals, however, that the Blossy incident did not occur in furtherance of the conspiracy on trial. It related to a separate conspiracy between Cooney and Hauser for the distribution of marijuana in Ithaca, New York. It had nothing to do with Cooney's arrangement with Levy to distribute marijuana in Albany, New York. Appellant had no connection whatever with Hauser or any arrangements involving Ithaca. The only common denominator between the two ventures was co-defendant Cooney.

Prior to the Government introducing evidence concerning the Blossy incident, appellant's counsel strenuously objected to the proposed proof upon the ground that it constituted hearsay of a prejudicial nature, and was

* The actual exhibits were not offered into evidence, the evidence concerning them was based upon the police officers' testimony.

not in furtherance of the conspiracy proven by the Government. The judge was informed that appellant's contentions were supported by a) Blossy's grand jury testimony; b) the proposed testimony of Michael Hauser; and c) the D.E.A. Report showing a diagram of Cooney's separate marijuana operations.* From all three sources, it appeared beyond any doubt that Blossy's trip on behalf of Hauser related solely to a conspiracy between Cooney and Hauser to ship marijuana from Tuscon, Arizona to Ithaca, New York.

The judge's attention was also called to two recent decisions of this Court pointing out that it is improper to admit evidence of a separate conspiracy simply because one or more of the defendants on trial may have been involved in both conspiracies: UNITED STATES v. MILEY, 513 F.2d 1191, 1205-1208 (1975); and UNITED STATES v. BERTOLOTTI, 529 F.2d 149, 154-158 (1975).

Appellant's counsel offered the D.E.A. Report for the judge's consideration in support of his argument. The judge read the report, but was unpersuaded. Appellant's counsel then offered the transcript of Blossy's grand

* These three items are set forth in appellant's appendix (35a-99a).

jury testimony, and further offered to call Hauser as a witness, out of the presence of the jury, to establish beyond any doubt that this incident was unrelated to appellant or the conspiracy on trial. The judge rejected both proffers, and denied appellant's motion for a severance or a mistrial (12a-28a).

In support of admitting this evidence, the Government conceded that appellant was not in any way involved in the Blossy incident (20a). Instead, it sought to justify the admission upon the following grounds (17a-20a). First, the incident occurred in furtherance of the conspiracy because Roth testified Cooney had stated that his marijuana operation extended to the midwest, Ithaca, Elmira, and Binghamton (291). Secondly, the evidence corroborated witnesses' testimony that Levy had stated that \$30,000 had been seized from one of his drivers, and Levy and Cooney had to bear the loss equally (673, 1054).

We submit that neither ground justified offering the evidence against appellant. To begin with, Cooney's narrative statement to Roth that he had been engaged in various marijuana operations did not prove that the four

defendants on trial had been engaged in Cooney's Ithaca operation. Nor could it be construed as broadening the scope of the conspiracy, in the face of the Government's proof that the four defendants were involved only in the marijuana shipments sent from Tuscon to Albany. Secondly, the evidence did not corroborate the Government's witnesses' claim that the money seized related to Levy's operations in Albany. The non-hearsay evidence produced by the Government showed, through the testimony of Hauser, that the Blossy incident did not at all involve the activities of Levy in Albany (82a-90a, 98a). This was confirmed by the grand jury testimony of Blossy (48a-50a, 71a). Thus, the Government's premise that the evidence related to the Levy operations in Albany was disproved by its own evidence of the Blossy incident.

Had the Blossy evidence not been admitted, there exists a distinct possibility that appellant would not have been convicted. The jury would have had to decide the case solely on the testimony of four witnesses who were self-confessed criminals that had obtained lenient treatment and immunity from their testimony at trial.

Indeed, as the polling process later revealed before accepting the verdict, Juror No. 10 stated to the judge that she still harbored a reasonable doubt as to appellant's guilt (119a).

It requires no imagination to recognize the impact of the Blossy evidence. Instead of relying upon accomplice testimony, the Government was able to present three law enforcement officials whose testimony could be more readily accepted because of their status, and the fact that the jury did not have to weigh their credibility with caution and care. Secondly, the similarity of the physical evidence concerning the automobile, large sums of cash, suitcases and shock absorbers could only have impressed the jury when weighing the accomplices' testimony concerning their alleged automobile shipments from Tuscon to Albany. Thirdly, the sworn testimony of the D.E.A. agent that Cooney was willing to pay \$1,000 for Blossy to drive a shipment of marijuana served to underscore the credibility of what the accomplices testified was their arrangement with Levy for driving shipments from Tuscon to Albany.

Appellant could not effectively cross-examine any of the witnesses because none of this evidence related to him. This was compounded by the alleged loss of tape recordings concerning the agent's conversation with both Cooneys. Once the jury was convinced of Cooney's guilt beyond a reasonable doubt, then the deliberation process must have lead the jury to be inclined to believe and accept the proposition that appellant was likewise guilty of the conspiracy.

Indeed, the Government's reliance and the impact of this evidence is demonstrated by the prosecutor's summation to the jury. After arguing at length the reasons the jury should accept the credibility of each accomplice, the prosecutor turned to the Blossy evidence. To refute the defense contention that the Government's case rested solely on accomplice testimony without any supporting evidence, the prosecutor retorted (2064):

You know, there were no drugs and no marijuana (seized). But they (the defense) overlooked that the Government was going to show a direct arrow, a direct arrow from Michael Hauser, and his twenty-five thousand dollars to Kevin Cooney. They overlooked that there was going to be a direct arrow from the Ithaca operation to Harold Levy in the Albany operation.

The prosecutor proceeded for four more pages of the transcript arguing that the Blossy evidence proves the conspiracy on trial. He concluded his remarks by stating (2068-69):

But Ladies and Gentlemen, Morlayne's testimony, and the close of this line of testimony we submit to you, that a conspiracy (proven) is clear.

Under the foregoing circumstances, we respectfully submit that appellant was deprived of a fair trial because the evidence had a prejudicial "spill-over effect" against appellant. A comparison of the diagram of the conspiracies set forth in this Court's opinion of the MILEY case with a diagram set forth by the D.E.A. in the instant case demonstrates, in our view, that the evidence of the Blossy evidence should not have been admitted because it was wholly unrelated to appellant or the conspiracy on trial. There was no reason for appellant to know or have reason to believe that Cooney had been engaged in a separate marijuana operation in Ithaca, New York. Hauser, Blossy and appellant had never met each other (98a). No evidence was offered to show appellant's awareness

of Cooney's Ithaca operation. To hold appellant accountable as a co-conspirator for the Blossy trip evidence would be contrary to the teachings of this Court in the MILEY and BERTOLOTTI cases, and in violation of appellant's right of confrontation.

The trial judge should have excluded the evidence, or granted appellant a severance. No limiting instruction would suffice to overcome the prejudicial effect of this evidence. For these reasons, we submit that the judgment of conviction should be reversed and a new trial ordered.

POINT II

THE JUDGMENT OF CONVICTION SHOULD BE SET ASIDE BECAUSE THE RECORD SHOWS THAT JUROR NO. 10, JUDITH EARL, HARBORED A REASONABLE DOUBT AS TO APPELLANT'S GUILT AND VOTED GUILTY UNDER UNDUE PRESSURES.

Appellant contends that the verdict below must be set aside because it does not represent a unanimous verdict of 12 jurors who were convinced of appellant's guilt beyond a reasonable doubt. Juror No. 10, Judith Earl, admitted upon being polled that she harbored a reasonable doubt as to appellant's guilt, and that she voted guilty

simply because she could not persuade 11 other jurors. The Court's interrogation unduly pressured the juror into her guilty verdict. The record shows, however, that despite the Court's continued interrogation, the juror continued to express her doubts as to appellant's guilt. We respectfully submit that the Court's interrogation, coupled with the late hour, the 11 hours of deliberations and the pending Christmas holiday, all contributed to undue pressures upon this juror in returning a vote of guilty.

We are confronted in this case with the trial judge's characterization of this incident as a "slight ripple in an uneventful trial," and "no emotional scene at all" (171a). It is indeed unfortunate that the typed transcript does not reveal this dramatic moment of the trial, and the facial expressions and pauses of Mrs. Earl in answering the questions propounded by the Court concerning her verdict. Appellant's view of this verdict was set forth in counsel's affidavit in support of the motion to set aside the verdict. In response to the motion, the Government did not challenge appellant's view; instead, the Government

characterized Mrs. Earl's responses as nothing more than a mere "expression of reluctance in arriving at a difficult decision in which she finally joined" (146a). We respectfully submit that appellant's view of the coercive atmosphere which contributed to Mrs. Earl's guilty verdict is nonetheless supported by the record.*

A reading of the interrogation shows that in the face of the judge's pointed questions, Mrs. Earl attempted to explain to the Court the reasons why she harbored a reasonable doubt as to appellant's guilt. However, each time the juror attempted to give an explanation, the judge interrupted and asked leading questions to elicit whether she stood by her guilty verdict, and whether or not it was the product of "coercion." Three times, Mrs. Earl advised the Court that she definitely was under "pressure." The judge never explained to the juror the Court's meaning of "coercion." Her subsequent answers indicating no

* Appellant's account was also supported by counsel's post-verdict interview of Mrs. Earl. Counsel represented to the Court that Mrs. Earl endorsed the account given by counsel in the post-verdict motion. Neither the Court nor the Government interviewed the juror (155a).

"coercion" did not remove her admission of being under pressure, and harboring a reasonable doubt.

Another indication of the coercive atmosphere is revealed by the fact that five times the judge felt it necessary to ask Mrs. Earl for a statement of her verdict. This would not have been necessary if Mrs. Earl's physical expressions during the interrogation did not indicate doubt about her verdict.

Nor can we perceive any proper purpose during the interrogation for the Court to ask Mrs. Earl: "How old are you?" It was asked when Mrs. Earl did not respond to the Court's question whether she found appellant guilty on the evidence and the law of the case. Both the Court and counsel knew Mrs. Earl's approximate age from observation. Jury selection showed she was a married woman whose father-in-law served as a Village Judge (36-37). When Mrs. Earl answered that she was twenty-five, she must have realized that the question impuned her competency and ability to act as a juror, and that her expressions of doubt about appellant's guilt reflected adversely upon her.

Apart from the question of whether a coercive atmosphere existed during this moment of the trial, we submit that the record nonetheless reveals that Mrs. Earl harbored a reasonable doubt as she sat in the jury box during the polling. Her expressions were not of past doubts, but of current doubts concerning appellant's guilt. At the very inception of the polling, Mrs. Earl announced that she would like to say "not sure, but realizing that I am not going to persuade 11 other jurors to change their vote" she felt she had no choice but to return a verdict of guilty. On three subsequent occasions during the continued interrogation by the Court, Mrs. Earl stated that she still harbored a reasonable doubt. On the first occasion, she advised the Court: "I am only saying this because of my reasonable doubt." She further told the Court that she had a reasonable doubt about appellant taking over the conspiracy. Finally, she pointed out to the Court that although she had no reasonable doubt about the co-defendants, she nonetheless had a reasonable doubt about appellant: "I mean the only one I felt unsure of, having any doubt on was the last Defendant, was Bruce Kay."

We respectfully submit that if Judith Earl was convinced of appellant's guilt beyond a reasonable doubt at the time she entered the jury box to announce the verdict, there would have been no need for any interrogation nor any explanations about her verdict. This was not a case of a confused juror. Mrs. Earl stated quite clearly that she was voting guilty because she could not persuade the 11 others.

As the record reveals, Mrs. Earl actively participated in the deliberations as shown by her specific request to have testimony read concerning appellant (106a-108a). She also revealed that she wanted the jury to review the Court's charge on the law of conspiracy. Thus, there is no basis upon which it can be concluded that Mrs. Earl's responses were the product of confusion, rather than a reasonable doubt.

It is, of course, fundamental that no person may lawfully be convicted by a jury unless every juror actually agrees that upon the evidence and the law of the case the person is guilty. UNITED STATES v. PLEVA, 66 F.2d 529, 531-33 (2 Cir. 1933); GRACE LINES, INC. v. MOTLEY,

439 F.2d 1028, 1032 (2d Cir. 1971). Verdicts have been set aside where the record revealed that although the juror voted "guilty," the juror also indicated some doubt about the verdict. A conditioned or qualified verdict cannot stand. See UNITED STATES v. EDWARDS, 469 F.2d 1362 (5 Cir. 1972) where the juror stated: "It's my verdict but I am still in doubt"; UNITED STATES v. McCOY, 429 F.2d 739 (D.C. Cir. 1970) where the juror stated: "Yes, with a question mark"; MATTHEWS v. UNITED STATES, 252 A.2d 505 (D.C. App. 1969) where the juror stated: "It is conditional"; UNITED STATES v. SEXTON, 456 F.2d 961 (5 Cir. 1972) where the juror stated: "I didn't vote either way"; and COOK v. UNITED STATES, 379 F.2d 966 (5 Cir. 1967) where the juror voted based on a request for leniency. In each of the foregoing cases, the juror announced that his or her verdict was "guilty" but nonetheless expressed some doubt during the polling process before the verdict was accepted.

In our opinion, the instant case falls well within this line of cases. Here, the record shows that there was far more interrogation by the Court which served only to

elicit more answers revealing that Mrs. Earl had a reasonable doubt about appellant's guilt despite her guilty verdict.

In two cases, this Court has addressed itself to the instant question. *GRACE LINES, INC. v. MOTLEY*, supra; and *UNITED STATES v. PLEVA*, supra. In *GRACE LINES*, a civil case, the jury returned a verdict for the defendant. In answer to the Clerk's polling, the juror indicated that she joined in the verdict: "Yes, only insofar as it had to be unanimous." Upon the Court's inquiry, the juror further explained that she had been a hold-out amongst the jury but changed her vote only because the verdict had to be unanimous. There was no further inquiry by the Court. The trial judge declared a mistrial.

On a petition for mandamus, this Court vacated the mistrial order and reinstated the verdict. The Court found nothing in the "frugal record" to indicate that the juror had surrendered her conscientious conviction (p.1032): "It may well be that she was afraid that the plaintiff would recover something, but when she was unable to persuade any other jurors, she accepted as reasonable the finding of the other eleven jurors...."

In sharp contrast, the record here is not "frugal." Nor does it indicate that Mrs. Earl had accepted the findings of the other jurors. In our view, Mrs. Earl's responses reveal that she had voted guilty out of frustration and the pressures of the moment without surrendering her honest conviction that she harbored a reasonable doubt as to the appellant. It was only after the trial judge's persistent questioning that Mrs. Earl capitulated, surrendered her conviction, and stated (120a): "I concede Bruce Kay is guilty" (Emphasis supplied).

In the PLEVA case, this Court did set aside a guilty verdict. There the record revealed that a juror advised the Court that he did not believe the defendants guilty, that he was suffering from a physical ailment during deliberations, and that he did not want to continue deliberations. The Court ordered continued deliberations and provided two doctors to examine and assist the juror. After further deliberations, the jury returned with a guilty verdict.

Upon the Court's inquiry, the juror indicated that neither doctor had provided a satisfactory examination

or assistance, and that he was unable to maintain his position against his fellow jurors. The Court found that the juror's verdict was the product of coercion and, in any event, could not be accepted in view of his express disagreement on the verdict.

We submit that the record in the instant case likewise reveals that Mrs. Earl expressed her doubts about appellant's guilt during the polling process, and capitulated into voting guilty because of the pressures resulting from the Court's interrogation, the length of deliberations, the late hour of the night, the impending Christmas holiday, and her frustrations at not being able to persuade eleven other jurors.

In the Court below, the Government contended that the Court must accept the verdict because no motion was made on behalf of appellant to have the jury retire for further deliberations. There is no merit to this argument. Had the motion been made, it would have been denied. In the memorandum-decision, the trial judge rejected this contention because the Court was convinced

the juror's verdict was not coerced and free from any reasonable doubt (168a).

The record does reveal, however, that appellant's counsel did attempt to object to the Court's acceptance of the verdict but was interrupted by the Court propounding another question to the juror for the purpose of again eliciting her "guilty" verdict (120a). The record is clear that counsel for appellant did not in any way agree that Mrs. Earl's vote was uncoerced or free from a reasonable doubt. Counsel's request to question the juror was summarily denied, and once the jury was discharged, the Court denied counsel's motion to set aside the verdict, and prohibited counsel from interviewing the juror prior to leaving the courthouse.

Under all of the foregoing circumstances, we respectfully submit that the judgment of conviction should be reversed and a new trial ordered because the guilty verdict was not unanimous against appellant.

Conclusion

FOR THE REASONS SET FORTH HEREIN, THE
JUDGMENT OF CONVICTION OF APPELLANT
BRUCE KAY SHOULD BE REVERSED.

Respectfully submitted,

JOSEPH W. RYAN, JR.
Attorney for Appellant
BRUCE KAY

United States Court of Appeals
For the Second Circuit

United States of America, Appellee,
against
Bruce Kay, Appellant

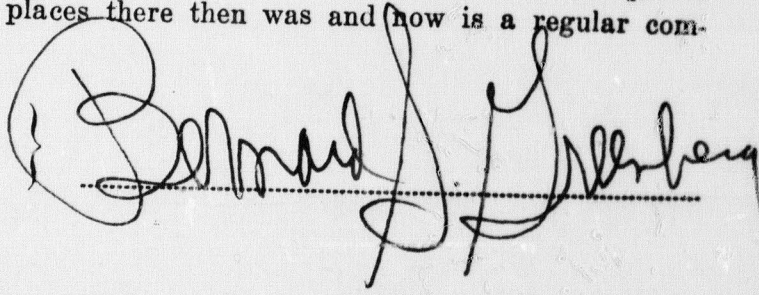
State of New York, County of New York, ss.:

Bernard S. Greenberg, being duly sworn deposes and says that he is
agent for Joseph W. Ryan, Jr., the attorney
for the above named Appellant herein. That he is over
21 years of age, is not a party to the action and resides at
162 East Seventh Street, New York, N.Y.
That on the 1st day of May, 1978, he served the within
Appendix and the Brief of Appellant
upon the attorneys for the parties and at the addresses as specified below

Paul V. French, United States Attorney,
Northern District of New York
United States Courthouse and Post Office
Albany, New York 11201

by depositing two copies appendix and two copies brief of
Appellant
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 1st
day of May, 1978


ROLAND W. JOHNSON,

Notary Public, State of New York
No. 4509705

Qualified in Delaware County
Commission Expires March 30, 1979